FILE COPY

No. 330.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

EUGENE KESSLER, District Director of Immigration and Naturalization,

Petitioner,

v.

JOSEPH GEORGE STRECKER.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

WHITNEY NORTH SEYMOUR,
Attorney for Respondent.

C. A. STANFIELD,
CAROL KING,
of Counsel.

INDEX.

CITATIONS.

Cases:

Statutes and Miscellaneous:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 330.

EUGENE KESSLER, District Director of Immigration and Naturalization,

Petitioner,

v.

JOSEPH GEORGE STRECKER.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

Opinions Below.

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 110) is reported in 95 F. (2d) 976. The opinion on rehearing (R. 117) is reported in 96 F. (2d) 1020.

Jurisdiction.

The original judgment of the Circuit Court of Appeals was entered April 6, 1938 (R. 117). An order denying a petition for rehearing was entered June 7, 1938 (R. 119), and on the same day an order was entered amending the judgment (R. 118). An order denying a second petition for rehearing, which had been filed June 27, 1938 (R. 121), was entered July 27, 1938 (R. 124). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statute Involved.

The relevant portions of the Act of October 16, 1918, c. 186, 40 Stat. 1012 as amended by the Act of June 5, 1920, c. 251, 41 Stat. 1008 (U. S. C., Title 8, Sec. 137 are set forth in the Appendix, *infra*, pages 8-9.

Statement.

The facts in this case, so far as presently material, are stated with substantial accuracy in the petition. That statement should be supplemented, however, by the following extract from the "Statutes of the Communist Party of the United States" contained in petitioner's membership book:

> "Members who are four weeks in arrears in payment of dues cease to be members of the Party in good standing. Members who are three months in arrears shall be stricken from the rolls. No member of the Party shall pay dues in advance for a period of more than six weeks" (R. 59).

This document is significant because, taken along with the undisputed facts that Strecker paid membership dues in the months of January and February, 1933 (R. 56), and not thereafter (R. 56), it establishes that Strecker must have been stricken from the rolls of the Party not later than the 1st day of June, 1933. The warrant of arrest did not issue, however, until the 25th day of November, 1933 (R. 14), nearly six months later. Since Strecker, therefore, was not a member of the Party at the time of the issuance of the warrant, the question necessarily involved is not whether present membership in the Communist Party constitutes a deportable offense but whether past membership constitutes such an offense.

Argument.

The Government states as the reasons for granting the writ the lack of uniformity among the circuits with reference to the deportability of members of the Communist Party. The petition should be denied because

I. The order appealed from is not a final order;

II. There is no conflict in the decisions of the various circuits requiring review of this case.

I.

The order appealed from is not a final order.

Although this Court may grant a writ of certiorari at any time when a proceeding is pending in the Circuit Court of Appeals (Sec. 240 [a] of the Judicial Code as amended by the Act of February 13, 1925; Rule 39 of the Rules of the Supreme Court of the United States) and may review non-

final orders on certiorari the jurisdiction is exercised sparingly and the fact that the judgment sought to be reviewed is not final, in the absence of extraordinary circumstances, furnishes sufficient ground for the denial of the application:

Hamilton-Brown Shoe Co. v. *Wolf Brothers,* 240 U. S. 251, 258 (1916);
Hanover Star Milling Co. v. *Metcalf,* 240 U. S. 403, 408, 409 (1916);
City and County of Denver v. *New York Trust Co.,* 229 U. S. 123, 133 (1913);
Taylor v. *Louisville & Nashville Railroad Company,* 172 U. S. 647 (1898);
The Three Friends, 166 U. S. 1, 49 (1897);
The Conqueror, 166 U. S. 110, 113, 114 (1897);
American Construction Co. v. *Jacksonville, T. & K. W. Railway Co.,* 148 U. S. 372, 383, 384 (1893);
Chicago and Northwestern Railway Company v. *Osborne,* 146 U. S. 354 (1892).

See also:

Schoenamsgruber v. *Hamburg Line,* 294 U. S. 454, 458 (1935);
Harriman v. *Northwestern Securities Co.,* 197 U. S. 244, 287 (1905);
Forgay v. *Conrad,* 6 How. 201, 205-6 (1848).

In the instant case it is plain that the judgment of the Circuit Court of Appeals is not final because, subsequent to the motion for rehearing, the judgment of reversal was amended to read "Reversed, with directions to try the issues *de novo*" (96 F. [2d] 1020). This Court has been

reluctant to grant writs of certiorari in cases where the order to be reviewed does not definitively dispose of the case. By withholding review until the stage of final judgment has been reached, repeated appeals are avoided. (*Schoenamsgruber* v. *Hamburg Line, supra.*)

There are not present here any extraordinary or exceptional circumstances requiring the issuance of a writ at this time, before the case has been presented *de novo* to the District Court as directed by the amended judgment below.

II.

There is no conflict in the decisions of the various circuits requiring review of this case.

The petition refers to various decisions and asserts that the decision below creates lack of uniformity upon the question whether membership in the Communist Party is a deportable offense. While it is true that the cases cited deal with this general question and that, in some of them, the courts appear to have taken the proscribed character of the Communist Party for granted, each depended upon its particular facts. As pointed out in *Ex parte Fierstein* (41 F. [2d] 53 [C. C. A. 9, 1930]) and by the court below in this case, the nature of the Communist Party was matter for evidence in each case, not for surmise or judicial notice and, therefore, observations not based on the records may not properly be regarded as the decisive elements in those cases. If there was, in any of those cases, improper reliance upon matters not in the particular record it may be anticipated that the opinion below will serve to suggest the impropriety of that course in future cases and the corrective process of this Court may well be withheld until such time as it is clear that other Circuit Courts are un-

willing to follow the decision below on similar records. As Judge Hutcheson said in the original opinion of the court below:

> "The decisions of the Circuit Courts of Appeals in Skeffington v. Katzeff, 1 Cir., 277 F. 129; Antolish v. Paul, 7 Cir., 283 F. 957; Ungar v. Seaman, 8 Cir., 4 F. 2d 80, on the authority of which it was held in Ex parte Vilarino, 9 Cir., 50 F. 2d 582; Kjar v. Doak, 7 Cir., 61 F. 2d 566, upon which the appellee relies here, that membership in the Communist Party of America alone is sufficient to warrant deportation, were rendered upon the Russian experience, and the record of the party at that time. They were all fact cases. They did not, they could not, decide that membership in the Communist Party of America, standing alone, is now sufficient to warrant deportation. The statute makes no such provision. Courts may not write it into the statute" (95 F. [2d] at p. 978).

Furthermore, it does not appear that, in any of the cases cited in the petition, documentary evidence such as is contained in the present record was treated as sufficient to justify deportation.

In its opinion the court below did not particularly advert to the fact that the respondent had ceased to be a member of the Communist Party some time before deportation proceedings were commenced although the effect of that circumstance was the chief question presented by the record and justified the absolute reversal contained in the original judgment of the court below. In only one of the cases cited by the Government was the question of the effect of past as distinguished from present membership involved (*U. S. ex rel. Yokinen* v. *Commissioner of Immigration*, 57 F. [2d] 707 [C. C. A. 2, 1932], certiorari denied, 287 U. S. 607 [1932]).

CONCLUSION.

For the foregoing reasons the petition for certiorari should be denied.

If, however, the Court should grant certiorari we suggest that review should be limited to the question now actually presented by the record in this case: whether an alien who joined the Communist Party in 1932 and ceased to be a member thereof some six months before issuance of the warrant for his arrest is nevertheless subject to deportation for such past membership.

Respectfully submitted,

WHITNEY NORTH SEYMOUR,
Attorney for Respondent.

C. A. STANFIELD,
CAROL KING,
of Counsel.

October, 1938.

APPENDIX.

(Act approved October 16, 1918 [40 Stat. 1012], as amended by the act approved June 5, 1920 [41 Stat. 1008].)

. . . .

That the following aliens shall be excluded from admission into the United States:

. . . . .

(c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, or (2) the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or any other organized government, because of his or their official character, or (3) the unlawful damage, injury, or destruction of property, or (4) sabotage;

(d) Aliens who write, publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, distribution, publication, or display, any written or printed matter advising, advocating, or teaching, opposition to all organized government, or advising, advocating, or teaching: (1) The overthrow by force or violence of the Government of the United States or of all forms of law, or (2) the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the

United States or of any other organized government, or (3) the unlawful damage, injury or destruction of property, or (4) sabotage;

(e) Aliens who are members of or affiliated with any organization, association, society, or group that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in subdivision (d).

. . . . . .

Sec. 2. That any alien who, at any time after entering the United States, is found to have been at the time of entry, or to have become thereafter, a member of any one of the classes of aliens enumerated in section one of this act, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported in the manner provided in the immigration act of February fifth, nineteen hundred and seventeen. The provisions of this section shall be applicable to the classes of aliens mentioned in this act irrespective of the time of their entry into the United States.